RAJESSELVI SINNAKARUPPAN *a*

v.

BATUMALAY JEYARAM

HIGH COURT MALAYA, JOHOR BAHRU *b*
SYED AHMAD HELMY JC
[DIVORCE PETITION NO: 33-495-1999]
30 JANUARY 2001

FAMILY LAW: *Divorce - Adultery - Proof of - Whether adultery simpliciter sufficient - Whether petitioner should find it intolerable to continue living with respondent* *c*

FAMILY LAW: *Divorce - Desertion - Whether made out - Law Reform (Marriage and Divorce) Act 1976, s. 56*

FAMILY LAW: *Divorce - Adultery - Claim for damages - Whether petitioner entitled to claim against respondent - Whether claim could only be made if adulteress made a co-respondent - Law Reform (Marriage and Divorce) Act 1976, ss. 58 & 59* *d*

The petitioner and the respondent respectively prayed for the dissolution of their marriage pursuant to s. 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The petitioner charged the respondent with desertion and adultery and claimed a lump sum payment of RM50,000 in damages whilst the respondent charged the petitioner with adultery. *e*

The issues were: (1) whether the petitioner was entitled to claim damages against the respondent under the Act; and (2) whether the court could exercise its inherent jurisdiction under O. 92 r. 4 of the Rules of the High Court 1980 ('RHC') to grant damages. *f*

Held: *g*

[1] Adultery simpliciter is not sufficient. For adultery to be made out there must have been sexual intercourse and the innocent spouse finds it intolerable to live with the offending spouse. The respondent himself had admitted to the charge of adultery. The birth of two children from the respondent's relationship with the adulteress established the adultery of the respondent and by reason thereof the petitioner found it intolerable to continue living with the respondent. Hence, the petitioner proved his charge of adultery against the respondent. The respondent on the contrary failed to prove the charge of adultery against the petitioner. *h* *i*

[2] Under s. 54 of the Act, the factum or physical separation of two years is one of the factors that the court should have regard in its inquiry into the facts and circumstances causing or leading to the breakdown of the marriage. Having seen the petitioner and the respondent and having heard the evidence, the court found that the factum of separation had been proved beyond reasonable doubt. The evidence adduced clearly established that the respondent had not made any attempt to resume his matrimonial relationship with the petitioner ever since he commenced his adulterous relationship, set up home and co-habitated with the adulteress. Hence, by reason thereof the respondent had deserted the petitioner.

[3] From the express wordings of ss. 58 and 59 of the Act, a claim for damages for adultery can only be made against a co-respondent and before such a claim can be entertained, the alleged adulterer or adulteress must be made a party to the action unless excused by the court on special grounds. The petitioner had not cited the adulteress as a party to the action and the reasons given for not bringing her as a co-respondent (*ie*, that she did not know the exact name of the co-respondent and was unable to give details of the co-respondent) were not acceptable. There was evidence adduced by the petitioner herself that the co-respondent was a friend of the petitioner and in the absence of special grounds to excuse the adulteress being cited as a party, the court could not embark upon the question of damages against a person who had not been brought in as a party to the action.

[4] The powers of the court in relation to maintenance of spouse is regulated under Part VII of the Act and in particular ss. 77 to 86 thereof and also s. 3 of the Married Women and Children (Maintenance) Act 1950. Under the Act, it is abundantly clear that the court's power is limited only to awarding maintenance and does not extend to the awarding of lump sum payment by way of damages. Though there are provisions for lump sum payment by way of compounding of maintenance nevertheless the compounding can only be made through an agreement by the parties and sanctioned by the court (s. 80 of the Act). In any event, the petitioner had also failed to adduce any evidence in support of her claim for damages.

[5] The issue here was whether or not substantive relief was provided for in the statute itself, *ie*, the Act and its interpretation thereof. Rules of court could not be utilised to empower the court where none existed in the statutory provision. The court's duty is to enquire whether the particular Act confers any powers on the court to grant the relief claimed and hence to interpret the provision accordingly.

[Decree nisi for divorce granted; no order for damages.]

Case(s) referred to:
Krishnadas Achutan Nair & Ors. v. Maniyam Sanykano [1997] 1 CLJ 636 ***(refd)***
Leow Kooi Wah v. Ng Kok Seng Philip & Anor [1995] 1 MLJ 852 ***(refd)***
Re CHS [1997] 3 MLJ 152 ***(refd)***
Thambyah v. Thambyah [1966] 1 MLJ 13 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 53, 54, 58(3)(b), 59, 77-86, Part VII
Married Women and Children (Maintenance) Act 1950, s. 3
Rules of the High Court 1980, O. 92 r. 4

For the petitioner - K Bharathy; M/s Kamarudin, Ramis & Assoc
For the respondent - Norman Fernandez; M/s Norman Fernandez & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Syed Ahmad Helmy JC:
This is a petition for divorce by the petitioner on the ground that the marriage has irretrievably broken down by reason of desertion and adultery of the respondent.

The petitioner and the respondent was lawfully married on 8 July 1982 at the Jabatan Pendaftaran Negara, Daerah Raub, Pahang under the provisions of the Law Reform (Marriage and Divorce) Act 1979. Thereafter they lived and cohabited at the Respondent mother's house at Sentul Pasar, Kuala Lumpur until sometime in 1983 when the respondent was banished to Kota Tinggi Johor under a Restricted Residence Order and stayed at a rented house in Kampung Jawa, Kota Tinggi Johor. The petitioner joined the respondent in Kota Tinggi but because she was employed in Singapore as Production Operator she stayed at the hostel provided by the company and travelled once a week to Kota Tinggi.

The petitioner charges the respondent with desertion and adultery and lump sum payment of RM50,000 as damages and in his answer the respondent charges the petitioner with adultery. On these grounds the petitioner and the respondent respectively pray for the dissolution of the marriage pursuant to s. 53 of the Law Reform (Marriage and Divorce) Act 1976.

On the charge of adultery it is to be observed that for adultery to be made out there must have been sexual intercourse and the innocent spouse finds it intolerable to live with the offending spouse – adultery simpliciter is not sufficient.

In the instant case from the cause papers and evidence adduced the respondent has himself admitted to the charge. The admission is to be found both in the respondent's answer to the petition dated 17 April 2000 and also in the respondent's evidence in court. The birth of two children from the respondent's relationship with the adulteress establishes the adultery of the respondent and by reason thereof the petitioner finds it intolerable to continue living with the respondent and hence it is my finding that the petitioner has proved the charge of adultery by the petitioner. The respondent on the contrary has failed to prove the charge of adultery against the petitioner. I now turn to the charge of desertion.

The ingredients and the degree of proof that has to be established in a plea of desertion is succinctly stated by Abdul Aziz J in the case of *Thambyah v. Thambyah* [1966] 1 MLJ 13 at para I to C:

> *Halsbury's* Vol. 12 pp 242 et seq says that the offence of desertion is a course of conduct and it must be proved that it has existed for a period of three years *(two years under s. 54(1) of the Law Reform (Marriage & Divorce Act 1979))* immediately proceeding the presentation of the petition and for the act of desertion to exist there must be both the factum or physical separation and there must be intention to desert (additions in italics mine). All the necessary ingredients of desertion must continue throughout the desertion period. In the case of desertion, the burden is on the petitioner to show that desertion without cause subsisted throughout the period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period that the petitioner should be able honestly to say that he or she were willing to fulfil the duties of marriage and the desertion was against his or her will and continued throughout the period without his or her consent. The court must be satisfied on the evidence that desertion is proved and it must be proved beyond reasonable doubt. The evidence need not reach certainty but it must reach a high degree of probability.

Under s. 54 of the Law Reform (Marriage and Divorce) Act 1976 the factum or physical separation of two years is one of the factors that the court should have regard in its inquiry into the facts and circumstances causing or leading to the breakdown of the marriage.

Having seen the petitioner and the respondent and having heard their evidence I find that the factum of separation has been proven beyond a reasonable doubt. The evidence adduced clearly establishes ever since commencing the adulterous relationship with "Yogam" in 1987 the respondent set up home and cohabited with Yogam and never made any attempt to resume matrimonial relationship with petitioner and has by reason thereof deserted the petitioner.

I now come to the question of the claim for damages in the sum of RM50,000 by the petitioner which is the principal issue upon which the petitioner is appealing.

Before delving into the question it is pertinent to note that the claim is one for damages against the respondent and no evidence has been adduced by the petitioner on how the sum of RM50,000 was arrived at. Further it should be emphasised that there was no co-respondent added in as a party to the petition herein.

Under the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as the Act) claims for damages is regulated by ss. 58 and 59 which states:

58 Damages for adultery may be claimed against co-respondent

(1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.

(2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.

(3) Where damages have been claimed against a co-respondent -

(a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or

(b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element.

59 Powers of court on claim to damages for adultery

(1) The court may award damages against a co-respondent notwithstanding that the petition against the respondent is dismissed or adjourned.

(2) The court shall have power, when awarding damages, to direct that such damages or any part thereof, be vested in trustees upon trust to pay the income or capital thereof for the benefit of the minor children, if any, of the marriage or, where the petitioner is required to pay maintenance to the respondent, in or towards the payment of such maintenance, and subject thereto in trust for the petitioner.

(3) Whenever in any petition presented by a husband the alleged adultery has been established against the co-respondent, the court may order the co-respondent to pay the whole or any part of the costs of the proceedings; provided that no such order for costs shall be made if the respondent was at the time of the adultery living apart from the husband and living the life of a prostitute or if the co-respondent had not at the time of adultery reason to believe the respondent to be a married woman.

From the express wording of the sections aforesaid it is clear that damages for adultery is only claimable against a co-respondent and before such a claim can be entertained the alleged adulterer or adulteress must be made a party unless excused by the court on special grounds. Thus it is incumbent upon a petitioner who intends to claim damages (which is only available against the adulterer or adulteress as the case may be) to make the adulterer or adulteress a co-respondent to the action.

In the instant case the petitioner has not cited the adulteress as a party to the action and as advanced by the petitioner's counsel in the written submission the reason for not bringing in the co-respondent as a party was because she did not know the exact name of co-respondent and was unable to give details of the co-respondent. The reasons advanced cannot be accepted by this court for there is evidence adduced by the petitioner herself that the co-respondent was a friend of the petitioner and in the absence of special grounds to excuse her citation as a party the court cannot embark upon the question of damages against a person who has not been brought in as a party to the action. I would also like to add that the usage of the word "may" in s. 58(3)(b) clearly shows that even if the co-respondent is brought in as party, the petitioner is not entitled as of right to claim damages. The term "may" relates only to the eligibility of the petitioner to claim damages, which quantum of damages upon proof is still within the discretion of the court to award – *Leow Kooi Wah v. Ng Kok Seng Philip & Anor* [1995] 1 MLJ 852.

Though the Act specifically enables the petitioner to claim damages from co-respondent are there any other provisions in the Act or any other statute which permits the petitioner to claim damages from the respondent?

The powers of the court in relation to maintenance of spouse is regulated under Part VII of the Act and in particular to ss. 77 to 86 thereof and also under s. 3 of the Married Women and Children (Maintenance) Act 1950.

Unlike the Singapore Women's Charter or the English Matrimonial Proceedings and Property Act 1970 which empowers the court to order lump sum payment there is no equivalent power conferred on the Malaysian Courts under the Married Women and Children (Maintenance) Act 1950 which only allows the court to order monthly maintenance. Similarly it would appear that except for the situation where both parties agree to lump sum settlement (which is again subject to the court's approval) there is no provision in the Law Reform (Marriage & Divorce) Act 1976 empowering the court to order lump sum settlement by way of maintenance.

Under s. 77 Law Reform (Marriage and Divorce) Act 1976 the court is empowered to order the payment of maintenance. Again the wording used throughout ss. 77 to 86 is "maintenance" and not damages.

Justice Mahadev Shankar J (as he then was) in the case of *Leow Kooi Wah v. Ng Kok Seng Philip & Anor* [1995] 1 MLJ 852 in answering the issue of lump sum payment had this to say at pp. 861-862.

> Admittedly, there is no parallel provision in the Act in *pari materia* with the UK or Singapore legislation. But the effect of our Act comes very nearly to the same thing. Section 80 of the Act covers the situation where the parties agree to the payment of a lump sum in cash or kind in lieu of periodic payments. Such agreement is subject to court approval. In the absence of agreement, the court has the power by s. 79 of the Act to order security for maintenance by vesting property in trust to pay such maintenance. The property could be a capital sum in money. Sections 79 and 80 come under the head of 'Maintenance of spouse'. As for children, s. 93 gives the court power to order maintenance and s. 94 is in the same terms as s. 79.
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> Where it is shown that the spouse has capital assets, I hold that the court can direct that it be used to secure the periodical payments ordered. The desire for a clean break may well precipitate an agreement under s. 80 of the Act.

Upon a careful analysis of the provisions regulating maintenance of spouse it is abundantly clear that the court's powers is conferred only to awarding maintenance and does not extend to the awarding of lump sum payment by way of damages. Though there are provision for lump sum payment by way of compounding of maintenance nevertheless the compounding can only be made through agreement by the parties and sanctioned by the court – Section 80 of the Act.

Section 79 by itself does not confer power on the court to order lump sum maintenance. It merely empowers the court to secure the whole or any part of the maintenance ordered through vesting of property in trustees and applying the income thereof towards payment of the maintenance ordered.

By reason of the aforesaid it is my conclusion that there is no statutory provision which empowers the court to grant damages as claimed by the petitioner – the provisions in the Act only empowers the court to order periodical payments by way of maintenance.

Even if I am wrong on this score, from the evidential point of view the petitioner has failed to adduce any evidence in support of her claim for damages and accordingly I did not make any order for damages in her favour.

In the course of her submission the petitioner's counsel conceded that there is no express statutory provision on whether damages is claimable against a respondent but contended that because the Act is silent on the petitioner's entitlement to claim damages from the respondent, a lacuna exists and urges the court to remedy the situation by exercising its inherent powers under O. 92 r. 4 of the Rules of the High Court.

I must confess that I cannot fathom counsel's submission on this point. What we are dealing with is whether or not substantive relief is provided for in the statute itself ie, the Act and its interpretation thereof. Rules of court cannot be utilised to empower power on the court when none exist in the statutory provision. The court's duty is to inquire whether the particular Act confers any powers on the court to grant the relief claimed and hence to interpret the provision accordingly.

In the interpretation of statutes the cardinal principle is to give effect to the statute according to its natural and ordinary meaning. As was stated by his Lordship Gopal Sri Ram JCA in writing for the Federal Court in *Krishnadas Achutan Nair & Ors. v. Maniyam Sanykano* [1997] 1 CLJ 636 as p. 645:

> The function of a court when construing an Act of Parliament is to interpret the statute is order to ascertain legislative intent by reference to the words appearing in the particular enactment. *Prima facie* every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant.

As Augustine Paul JC said in *Re CHS* [1997] 3 MLJ 152 at p. 158:

> As I had said in *PP v. Mohd Ali bin Jaafar* [1997] 4 MLJ 221 at p. 229:
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> > Thus the fundamental rule of interpretation of a statute is to ascertain the intention of parliament. If the words in the statute are in themselves precise and unambiguous, the Court must give effect to them according to their natural and ordinary meaning, as the words themselves best declare the intention of parliament.

At p. 160 in *Re CHS* his Lordship Augustine Paul JC clearly emphasised that the inherent jurisdiction under O. 92 r. 4 is only intended to be exercised to overcome procedural injustice arising from a *lacuna* in the rules and not to remedy any *lacuna* in the substantive Act when he stated:

> The inherent jurisdiction of the Court under O. 92 r. 4 of the RHC can be exercised in a situation where a lacuna exists in the RHC and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies and the Court is then not only entitled to fill the gap, but is obliged to do so, in order to avoid an injustice (see *Loo Choy Meng v. Ong Cheong Hoe (Gamuda Sdn Bhd, Garnishee* [1990] 1 MLJ 445).

Decree nisi for divorce allowed.